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To: The Staff of the Division of Investment Management

From: Phillip Goldstein, Managing Member (pgoldstein@bulldoginvestors.com)

Re: Control Share Statutes and the Withdrawal of the Boulder Letter

Date: April 26, 2021

To paraphrase Oliver Hardy, “Well, here’s another nice mess you’ve gotten everyone into!”

To summarize, the Boulder Letter presented a well-reasoned legal analysis explaining why a registered investment company (“RIC”) would violate Section 18(i) of the Investment Company Act of 1940 (the “ICA”) by opting into a state control share statute (“CSS”). To put it another way, the Boulder Letter was effectively a non-binding legal opinion concluding that a RIC, “by opting in to [a CSS], would be acting in a manner inconsistent with Section 18(i).” That conclusion was “supported by the wording of, and purposes underlying, Section 18(i) specifically and the Investment Company Act generally.” To be sure, the Boulder Letter was not a “no action” letter nor an exemptive order,¹ both of which need to be requested typically contain an explanation for being issued and which can be withdrawn or modified if future circumstances merit it.

However, when the staff “withdrew” the Boulder Letter via a Staff Statement issued on May 27, 2020 (the “Staff Statement”), it did not cite a single sentence in that letter that, upon further consideration, it had come to believe was incorrect. Instead, its rationale for withdrawing it was “market developments since its issuance and recent feedback from affected market participants.” That is simply a non sequitur. If the staff truly came to believe that investors might benefit if a registered investment company (“RIC”) opted into a state control share statute (“CSS”), it should have proposed that it would consider issuing an exemptive order.

A reader of the Staff Statement cannot tell whether the staff now believes the Boulder Letter’s reasoning or conclusion is or may be incorrect. The only thing a reader knows for sure is that the staff, based upon “market developments” and “recent feedback

¹ A “no action” letter advises the recipient that a specified action is probably lawful and the staff will not recommend enforcement action to the Commission provided the recipient abides by the conditions, if any, set forth in the letter. If the staff concludes that the requested action is probably unlawful but there is a good reason for allowing it, the requesting person must obtain an exemptive order. The Staff Statement was novel because it effectively granted blanket “no action” relief to all RICs without a request for no action or exemptive relief and without affording the public an opportunity to comment on such a request.

from affected market participants,”² promised not to recommend any enforcement action to the Commission if the board of a RIC elected in good faith to opt into a CSS. Given the staff’s decision to withdraw the Boulder Letter without expressly repudiating its reasoning or conclusion, it is not surprising that private litigation has developed to fill the void left by the staff.

Specifically, in *Saba Capital CEF Opportunities 1, Ltd. et al. v. Nuveen Floating Rate Income Fund, et al.*, No. 1:21-cv-327 (S.D.N.Y.), the court is being asked to determine whether a bylaw that prohibits a shareholder of a RIC from voting any shares it acquires above one-tenth of all of the RIC’s voting power violates Section 18(i).³ Based upon the parties’ filings, it does not appear that there are any disputed facts that are relevant to the analysis. Thus, barring a procedural impediment or a settlement, it appears likely that the court will make a decision fairly promptly.

In the enclosed defendants’ brief in support of their motion to dismiss, they make two arguments on the merits which are addressed below.

1. A prohibition on the ability of a holder of control shares to vote them does not violate Section 18(i).

The defendants assert that there is a distinction between restricting voting rights of control shares (which they claim they have not done) and restricting the ability of a holder of control shares to vote them. The Boulder Letter found this argument to be “without merit” because “[t]he plain wording of Section 18(i), in conjunction with Sections 2(a)(36) and 2(a)(42)...clearly prohibits discrimination between or among both shares and shareholders.” As noted above, the Staff Statement is silent about this argument.

More importantly, as the Boulder Letter concluded, control shares are not voting shares because they do not presently entitle the holder to vote them for the election of directors. Nevertheless, the defendants brazenly assert that “the stock acquired in a Control Share Acquisition always retains its status as a voting stock.” We don’t know what to make of such an obviously untrue statement but in any event, there is no need to resolve the esoteric share vs. shareholder debate

² The only “market development” cited by the staff is “the number of listed closed-end funds has declined considerably since the issuance of the Boulder Letter, although it is unclear to what extent the unavailability of control share statutes under the Boulder Letter may have contributed to this trend.” No examples of “recent feedback from affected market participants” are provided. Significantly, the Staff Statement did not explain why either of these things would cause the Boulder Letter’s analysis to change.

³ The bylaw in question reads substantially the same, and has the same effect, as a typical CSS.

in order to rule that control shares that cannot be voted by their holder are not voting shares and thus are issued in violation of Section 18(i).⁴ In short, “case closed.”

The defendants also assert that a finding that a prohibition on voting control shares “cannot be squared with” other provisions and rules of the securities laws like Section 12(d)(1)(e)(iii)(aa) of the ICA that limit or delay a shareholder’s ability to vote its shares.⁵ The argument is specious because, as the Boulder Letter explained, Section 18(i) specifies that all stock issued by a RIC must be voting stock “[e]xcept... as otherwise required by law” and no law requires a RIC to issue non-voting stock.

Lastly, the defendants cite several cases in which a court distinguished between the voting rights of shares and shareholders. Only one such case, *Neuberger Berman Real Estate Fund, Inc. v. Lola Brown Trust No. 1B*, 342 F. Supp. 2d 371(D. Md. 2004) involved an interpretation of a provision of the ICA, specifically Section 18(d). As the Boulder Letter noted, “The [*Neuberger Berman*] court did not reach the issue of whether a [RIC] would violate Section 18(i) of the Act by opting in to [a CSS].” Thus, neither *Neuberger Berman* nor any of the other cases cited by the defendants is relevant.

2. The Staff Statement represents an interpretation by the staff that Section 18(i) does not prohibit a RIC from adopting a control share bylaw and that purported interpretation should be given great weight by the court.⁶

⁴ The defendants make a half-hearted attempt to suggest that the definition of voting securities in Section 2(a)(42) may not apply to voting shares as used in Section 18(i). Notably, they offer no alternative definition of voting shares.

⁵ Section 12(d)(1)(e)(iii)(aa) specifies a method of voting shares of a RIC in certain circumstances. It does not, as a control share provision does, prohibit a shareholder from voting its shares.

⁶ This is apparently a fallback argument since, prior to presenting it, the defendants assert (and the plaintiffs agree) that the meaning of Section 18(i) is unambiguous, in which case the court would not benefit from reviewing the Staff Statement.

When a court reviews an agency’s interpretation of a statute it is charged with administering, the court will generally apply the two-step framework outlined by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). First, the court will examine “whether Congress has directly spoken to the precise question at issue.” If so, “that is the end of the matter” and courts must enforce the “unambiguously expressed intent of Congress.” In the case of statutory silence or ambiguity, however, step two requires courts to defer to a reasonable agency interpretation of the statutory text, even if the court would have otherwise reached a contrary conclusion.

For the reasons provided in the Boulder Letter, Section 18(i) unambiguously prohibits a RIC from opting into a CSS or adopting an equivalent bylaw. And nothing in the Staff Statement provides a reason for giving the Boulder letter less weight than it had before May 27, 2020. To put it bluntly, the Staff Statement

As noted above, the Staff Statement is silent about the Boulder Letter's conclusion that a RIC "by opting in to [a CSS], would be acting in a manner inconsistent with Section 18(i)." It is misleading for the defendants to assert otherwise but understandable given the staff's failure to make its position clear (and the lack of any legitimate basis for challenging the Boulder Letter's analysis). In sum, given the lack of interpretive guidance in the Staff Statement, it, unlike the Boulder Letter's thorough legal analysis, has no persuasive value at all.

Notably, the *Neuberger Berman* court, in an caustic footnote, chastised the SEC for its decision to remain a bystander in that case:

It also bears mention that, despite vigorous lobbying by counsel for all parties to this case, the SEC has stood by calmly on the sidelines throughout this dispute. Indeed, the SEC declined an offer communicated to it directly by the court to file an amicus brief in this case, which the parties describe repeatedly as a case of first impression in the closed-end fund industry....In light of its overarching regulatory role in protecting shareholders, it would be curious for the SEC to maintain its inactivity if it thought violations of federal securities laws were manifest.

By failing to provide its views to the *Neuberger Berman* court, the Commission's credibility as an engaged and impartial interpreter of a statute it is assigned to enforce was impaired. The withdrawal of the Boulder Letter without addressing the "elephant in the room" question of whether opting into a CSS or adopting an equivalent bylaw violates Section 18(i) has also undermined its reputation of impartiality.⁷ Much as the defendants, like the Wizard of Oz, would like the court to "pay no attention" to the Boulder Letter, we do not foresee the *Saba Capital* court disagreeing with its analysis or its conclusion that a control share that cannot be presently voted by its holder is not a voting share.

The Commission has an opportunity to enhance its stature by telling the *Saba Capital* court in an amicus brief or otherwise whether or not it thinks the Boulder Letter is correct. As the song goes, "and when you get the chance to sit it out or dance, I hope you dance."

does not provide a reason to put the well-reasoned Boulder Letter genie back in the bottle.

⁷ The Staff Statement received plaudits from the industry's main lobbyist and unsurprisingly triggered an avalanche of RICs opting into a CSS or adopting an equivalent bylaw.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| SABA CAPITAL CEF OPPORTUNITIES 1, | : | |
| LTD., and SABA CAPITAL MANAGEMENT, | : | |
| L.P., | : | |
| | : | |
| Plaintiffs, | : | 21 Civ. 327 (AT)(RWL) |
| | : | |
| v. | : | |
| | : | |
| NUVEEN FLOATING RATE INCOME | : | |
| FUND, NUVEEN FLOATING RATE | : | |
| INCOME OPPORTUNITY FUND, NUVEEN | : | |
| SHORT DURATION CREDIT | : | |
| OPPORTUNITIES FUND, NUVEEN | : | |
| GLOBAL HIGH INCOME FUND, NUVEEN | : | |
| SENIOR INCOME FUND; and TERENCE J. | : | |
| TOTH, JACK B. EVANS, WILLIAM C. | : | |
| HUNTER, ALBIN F. MOSCHNER, JOHN K. | : | |
| NELSON, JUDITH M. STOCKDALE, | : | |
| CAROLE E. STONE, MARGARET L. | : | |
| WOLFF, ROBERT L. YOUNG and | : | |
| MATTHEW THORNTON III, in their capacity | : | |
| as Trustees of the Nuveen Trusts, | : | |
| | : | |
| Defendants. | : | |
| ----- | x | |

**DEFENDANTS' JOINT MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

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Defendants Nuveen Floating Rate Income Fund ("JFR"), Nuveen Floating Rate Income Opportunity Fund ("JRO"), Nuveen Short Duration Credit Opportunities Fund ("JSD"), Nuveen Global High Income Fund ("JGH"), Nuveen Senior Income Fund ("NSL," and collectively, the "Funds"), Terence J. Toth, Jack B. Evans, William C. Hunter, Albin F. Moschner, John K. Nelson, Judith M. Stockdale, Carole E. Stone, Margaret L. Wolff, Robert L. Young and Matthew Thornton III (collectively, the "Trustees" and together with the Funds, the "Defendants") respectfully submit this joint memorandum of law in support of their joint motion to dismiss the Complaint (ECF No. 1) pursuant to Rules 8(a), 12(b)(6), and 23.1 of the Federal Rules of Civil Procedure.¹

PRELIMINARY STATEMENT

On January 14, 2021, Plaintiffs Saba Capital CEF Opportunities 1 Ltd. and Saba Capital Management, L.P. (collectively, "Saba" or "Plaintiffs") filed the Complaint against Defendants -- five Massachusetts business trusts registered as closed-end investment companies under the Investment Company Act of 1940 (the "ICA") and their Trustees. Saba is a well-known "activist" investor that specializes in buying up shares in closed-end funds at a discount to the funds' net asset value ("NAV") in order to seize control of the funds and force dramatic changes to maximize its own self-interest -- typically by creating a "liquidity event" -- at the expense of the funds' other shareholders (who largely invest in closed-end funds for their long-term returns).

Here, the Complaint alleges that a by-law amendment adopted by the Funds' boards of trustees in October 2020 (the "Control Share Amendment") violated Section 18(i) of

¹ A true and correct copy of the Complaint is attached as Exhibit A to the Declaration of Scott D. Musoff, dated March 30, 2021, exhibits to which are cited herein as "Ex. ____." Citations to the Complaint are hereinafter cited as "Compl. ¶ ____."

the ICA, which generally requires that shares of stock issued by ICA-regulated companies "shall be a voting stock and have equal voting rights with every other outstanding voting stock." 15 U.S.C. § 80a-18(i). In particular, the Control Share Amendment stipulates that shareholders who obtain beneficial ownership of common shares of a Fund in a "Control Share Acquisition" (*i.e.*, resulting in voting power in excess of ten percent) may exercise voting rights with respect to such shares only to the extent authorized by other shareholders of the Fund. Importantly, the Control Share Amendment was not created in a vacuum: nearly half of the states, including Massachusetts, have enacted control share statutes which corporations may elect to opt into (including ICA-regulated funds). Moreover, the Staff of the Securities and Exchange Commission ("SEC") -- *i.e.*, the government agency tasked with enforcing the ICA -- recently addressed in May 2020 the very legal question raised by the Complaint. Contrary to the legal arguments Saba makes in its Complaint, the SEC Staff concluded that it would *not* recommend enforcement action under Section 18(i) against funds that were eligible to and did opt-in to control share statutes (and the SEC's analysis applies equally to control share provisions adopted in a fund's by-laws, as is the case here).

Importantly, Saba's Complaint does not allege that the language of the Funds' Control Share Amendment or the process by which it was adopted by the Trustees make that provision violative of Section 18(i); instead, Saba's Complaint alleges that *all* control share provisions are *per se* illegal for *all* entities regulated under the ICA. Thus, for Saba's Complaint to withstand a motion to dismiss (which it cannot), the Court must find that it plausibly states a claim that all control share provisions -- whether provided in by-laws (as here) or as part of an opt-in to a state control share statute -- are *per se* illegal under the ICA in all circumstances. Put another way, if the Court recognizes, *as the staff of the SEC has expressly stated*, that it is legal

for a fund to adopt a control share provision in at least some circumstances, then the Complaint fails on its face and must be dismissed. Saba provides no basis on which this Court should find differently.

For the reasons discussed below, the Complaint fails to state a claim and should be dismissed on multiple grounds:

First, the Control Share Amendment is consistent with the plain language of Section 18(i). In particular, Section 18(i) only addresses the voting rights attached to *stock*, and the Control Share Amendment by its terms does not remove voting rights from any stock. Instead, the Control Share Amendment impacts the ability of a given *shareholder* to exercise voting rights in certain circumstances, which is not implicated in any way by the plain language of Section 18(i). Saba's argument to the contrary conflates a *stock's* voting rights with a *shareholder's* ability to vote, even though Saba's argument is at odds with another section of the ICA and caselaw analyzing Section 18(i) (and similar state statutes), each of which recognizes that it is entirely lawful to limit the ability of a given *shareholder* to exercise voting rights in certain circumstances. (*See infra* at pp. 11-20.)

Second, the Control Share Amendment's legality under Section 18(i) is additionally confirmed because it is consistent with the stated policies and purposes of the ICA. Indeed, the prefatory language in the ICA makes clear that it was designed to prevent investment companies (*i.e.*, the Funds) from being run for the benefit of concentrated shareholders (*i.e.*, those subject to the Control Share Amendment) like Saba. (*See infra* at pp. 20-21.)

Third, for the Court to agree with Saba's interpretation of Section 18(i) -- *i.e.*, that all control share provisions are *per se* illegal under the ICA in all circumstances -- it would require that the Court *disagree* with the SEC Staff's interpretation of that same statute. Although

Saba strains to argue that the Court is not *required* to follow the SEC Staff's interpretation, Saba has not denied (and cannot) that the SEC Staff's position is persuasive authority, particularly because the ICA (including, necessarily, Section 18(i)) is exclusively enforced by the SEC. In any event, if the Court adopts the SEC Staff's interpretation of Section 18(i), the Complaint must be dismissed because it lacks any allegations (conclusory or otherwise) that Defendants adopted the Control Share Amendment without "reasonable care on a basis consistent with other applicable duties and laws and the duty to the fund and its shareholders generally." (*See infra* at pp 21-24.)

Fourth, Saba's request for a declaratory judgment is independently improper because when a party (as here) seeks a declaratory judgment to rescind all or part of a contract, it must allege an imminent attempt to enforce that contract in order to present an "actual controversy." Because the Complaint is devoid of any allegations of an "imminent attempt" by Defendants to enforce the Control Share Amendment against Saba -- including any allegation that Saba has made (or even intends to make) a control share acquisition in any Fund -- Saba's request for a declaratory judgment is premature. (*See infra* at pp. 24-26.)

Fifth, although Saba only alleges "in the alternative" that its claims are derivative in nature (Compl. ¶ 30), Defendants note that Saba's demand letters -- which were served on the same day that the Complaint was filed -- entirely failed to comply with the demand requirements of Massachusetts' universal demand statute and the Funds' by-laws. The Complaint's conclusory allegations suggesting that it was excused from complying with pre-suit demand requirements find no support in Massachusetts law. (*See infra* at pp. 26-28.)

FACTUAL BACKGROUND²

1. Saba -- a Self-Identified "Activist" Investor with a History of Plotting Activist Takeover Bids -- is the Beneficial Owner of Shares in each of the Funds

The Funds are organized as separate Massachusetts business trusts and registered as closed-end investment companies under the ICA, 15 U.S.C. §§ 80a-1, *et seq.*, and their shares are listed for trading on the New York Stock Exchange. (Compl. ¶¶ 7-11.)³ Each Fund is managed in a manner consistent with the Fund's investment objective to achieve "current income" for its shareholders through investments in various instruments (*e.g.*, senior loans, corporate debt securities, adjustable rate loans, *etc.*). (Ex. B (Funds' annual reports).) Each Fund discloses that it is "designed primarily for long-term investors, and [investors or potential investors] should not view the Fund as a vehicle for short-term trading purposes." (*Id.*) Saba is a beneficial owner of shares in each of the Funds. (Compl. ¶ 5.)

For its part, Saba is a self-described "activist" investor, which specializes in purchasing shares in closed-end funds at a discount to the funds' NAV. (*See, e.g.*, Exs. C - E (described *infra*).) In particular, once Saba has amassed a significant percentage of the shares of

² The facts in this section are drawn from the Complaint together with documents incorporated therein by reference, legally required public documents filed with the SEC, and matters of which the Court may take judicial notice (each such document is additionally included in the accompanying Musoff Declaration). *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007); *see also Rudman v. CHC Grp. LTD.*, 217 F. Supp. 3d 718, 723 (S.D.N.Y. 2016) ("In addition to the allegations within the four corners of the complaint, . . . the Court may consider [on a motion to dismiss] . . . statements or documents incorporated into the complaint by reference, legally required public disclosure documents filed with the SEC, and documents possessed by or known to the plaintiff and upon which it relied in bringing the suit." (internal quotations omitted)).

³ A closed-end fund is a type of investment company whose shares are not redeemable. Instead, a closed-end fund's shares may be listed on a stock exchange or traded in the over-the-counter market. Listed closed-end funds (like the Funds, here) are created by issuing a fixed number of common shares to investors during an initial public offering (but subsequent issuances of common shares can occur through secondary or follow-on offerings, at-the-market offerings, rights offerings, or dividend reinvestments).

a target fund, it thereafter attempts to force various fund actions or governance changes at the fund to further its own self-interest. (*Id.*) Saba's actions in this regard are well-documented in its filings with the SEC, and include its attempts to:

- i. elect to a fund board one or more directors or trustees affiliated with or favored by Saba (*see, e.g.*, Ex. C (Saba, SEC Schedule 14A, filed in reference to Western Asset High Income Fund II Inc. (Sept. 6, 2019) (proposing Saba's own slate of director nominees)));
- ii. declassify a fund board, such that all directors or trustees stand for reelection simultaneously (*see, e.g., id.* (Western Asset High Income Fund II Inc. (Sept. 6, 2019) (proposing to "declassify the Board so that all directors are elected on an annual basis")));
- iii. authorize a tender offer by a fund to repurchase up to a specified percentage of the fund's outstanding shares (*see, e.g.*, Ex. D (Saba, SEC Schedule 14A, filed in reference to Neuberger Berman High Yield Strategies Fund Inc. (Aug. 28, 2019) (proposing that Board authorize a self-tender offer, and that fund liquidate or convert to open-end fund if more than 50% of trust's outstanding shares submitted for tender)));
- iv. change a fund investment adviser from the original sponsoring adviser to another entity affiliated with or favored by Saba (*see, e.g., id.* (Saba, SEC Schedule 14A, filed in reference to Neuberger Berman High Yield Strategies Fund Inc. (Aug. 28, 2019) (proposing Saba's own slate of trustee nominees and proposing to terminate the advisory agreement between the fund and its investment adviser)));
- v. convert a fund from a closed-end structure to an open-end structure or merge into an open-end fund (*see, e.g.*, Ex. E (Saba, SEC Schedule 13D, filed in reference to BlackRock Muni New York Intermediate Duration Fund, Inc. (Apr. 1, 2019) (proposing that trust liquidate or convert to open-end fund if more than 50% of trust's outstanding shares submitted in self-tender offer))); and
- vi. liquidate a fund (*see, e.g., id.* (Saba, SEC Schedule 13D, filed in reference to BlackRock Muni New York Intermediate Duration Fund, Inc. (Apr. 1, 2019) (proposing that trust liquidate or convert to open-end fund if more than 50% of trust's outstanding shares submitted in self-tender offer))).

Each of these activist strategies is designed to capture windfall profits through short-term increases in the target fund's share prices: because Saba obtains the shares at a discount to NAV, these actions -- which are ultimately designed to enable Saba to sell its shares at or near NAV --

create a potential arbitrage opportunity for short-term profits that Saba seeks to exploit. (*See id.*)

Consistent with its approach in pursuing its prior activist strategies, Saba began amassing significant amounts of shares in each of the Funds in recent years. (*See, e.g.*, Exs. F-G (Saba's disclosures of its increases in its beneficial ownership of (i) 400,138 JGH shares in December 2018 to 2,288,325 shares in December 2020; (ii) 13,519 JSD shares in December 2018 to 1,211,203 shares in December 2020; (iii) 87,415 NSL shares in December 2018 to 3,815,160 shares in December 2020; (iv) 266,251 JRO shares in December 2018 to 4,493,406 shares in December 2020; and (v) 143,887 JFR shares in December 2018 to 6,685,445 shares in December 2020).) At present, Saba is the beneficial owner of at least 9.9% of each of the Fund's outstanding shares. (Compl. ¶ 5.)

2. In May 2020, the SEC Staff Issued a Statement Regarding Their "No Action" Position Relating to Control Share Provisions

At the same time Saba was amassing shares in the Funds, federal regulators recognized the potential harm to closed-end funds from the strategies of Saba and other activist investors in the closed-end fund space. In particular, on May 27, 2020, the Staff of the SEC's Division of Investment Management published a statement that withdrew a prior no-action letter (*i.e.*, the "*Boulder Letter*"), which concerned the interaction between Section 18(i) and a state control share acquisition statute. (Ex. H (Staff Statement, U.S. Securities and Exchange Commission, Control Share Acquisition Statutes (May 27, 2020) ("SEC Staff Statement")).)

As an initial matter, the SEC Staff Statement noted that approximately half of state corporate laws have control share statutes in effect. (*Id.* at 2.) These statutes provide companies with the right to opt-in to provisions that restrict the voting power of any person who, directly or indirectly, acquires ownership of, or the power to direct the vote of, "control shares" of the company (which term is defined in each statute as equal to or in excess of specified voting

percentages of the company's total voting power). (*Id.*) After acquiring a control share of a company, a control shareholder cannot vote its control shares unless the company's other stockholders vote to approve the restoration of voting rights by an affirmative vote of a specific proportion of those stockholders. (*Id.*)

Thereafter, the SEC Staff explained that it was *withdrawing* the *Boulder* Letter: *i.e.*, a 2010 no-action letter in which the SEC Staff had indicated that Maryland's control share statute was "inconsistent" with Section 18(i). *See id.*; *see also* Md. Code, Corps. & Ass'ns § 3-701 *et seq.* (defining "[c]ontrol shares" to include voting power of "[o]ne-tenth or more," and stating that "[h]olders of control shares of the corporation acquired in a control share acquisition have no voting rights with respect to control shares except to the extent approved by the stockholders"). Instead, the SEC Staff noted that "in light of recent market or other developments":

The staff would ***not recommend enforcement action*** to the Commission against a closed-end fund under section 18(i) of the Act for opting in to and triggering a control share statute if the decision to do so by the board of the fund was taken with reasonable care on a basis consistent with other applicable duties and laws and the duty to the fund and its shareholders generally.

We would expect any inquiry into the application of section 18(i) to be based on the facts and circumstances. In particular, the staff reminds market participants that any actions taken by a board of a fund, including with regard to control share statutes, should be examined in light of (1) the board's fiduciary obligations to the fund, (2) applicable federal and state law provisions, and (3) the particular facts and circumstances surrounding the board's action.

(SEC Staff Statement at 2 (emphasis added).) Shortly following this guidance, the Funds adopted the Control Share Amendment at issue in this action, which operates in a manner similar to the Maryland control share statute analyzed by SEC Staff (a fact Saba does not dispute).

3. In October 2020, the Funds Amended Their By-Laws to Include the Control Share Amendment

On October 5, 2020, the Trustees adopted amended and restated by-laws for the Funds, which included (among other amendments) the Control Share Amendment (collectively, the "By-Laws"). That amendment defines a "Control Share Acquisition" as an acquisition of beneficial ownership of common shares after the date of the By-Laws' enactment which, taken together with the shares already owned by that person before the By-Laws' enactment, entitles the person to any of four different ranges of voting power: "(i) one-tenth or more but less than one-fifth of all voting power; (ii) one fifth or more but less than one-third of all voting power; (iii) one-third or more but less than a majority of all voting power; or (iv) a majority or more of all voting power." (Ex. I at § 9.1(c)(i).)

The person making such a Control Share Acquisition "shall have the same voting rights with respect to those Common Shares [in a Control Share Acquisition] as the beneficial owners of all other Common Shares of the Trust only to the extent authorized by vote of Shareholders at a meeting of Shareholders" by an affirmative vote of the holders of a majority of all shares entitled to vote. (*Id.* § 9.4(b).) That authorization vote can occur in one of two ways: *first*, the person making the Control Share Acquisition may deliver to the Fund a Control Share Acquisition Statement demanding a special meeting of shareholders to hold the authorization vote, or *second*, if no such demand is made in the Control Share Acquisition Statement, the authorization vote will be held at the next scheduled annual or special meeting of the Fund. (*Id.* § 9.3.) Once a shareholder authorization vote is held for a person's Control Share Acquisition within one of the four ranges of voting power and such authorization is *not* granted, that person may not demand additional shareholder consideration of its voting rights within that same range

of voting power for the next two calendar years. (*Id.* § 9.3(d).)

Importantly, once a person transfers beneficial ownership of shares that constitute a Control Share Acquisition to another person (and such transfer does not constitute a Control Share Acquisition), the receiving person will be entitled to vote those shares. (*Id.* § 9.4(d).)

**4. On the Same Day as Filing the Complaint,
Saba Sent Demand Letters to the Funds' Boards Under M.G.L. Ch. 156D § 7.42**

On January 14, 2021, Saba served demand letters to the Trustees of each of the Funds under M.G.L. Ch. 156D § 7.42. (Ex. J (compilation of Saba's January 14, 2021 demand letters).) Although those letters requested that the Trustees "commence judicial action" because of the purported "conflict" between the Control Share Amendment and Section 18(i), Saba initiated the present action on that same day. (*Id.* at 1-2; *see generally* Compl.) The Complaint alleges two claims against the Funds and Trustees relating to the Control Share Amendment: (i) a claim for contractual rescission of the Control Share Amendment given the alleged violation of Section 18(i); and (ii) a declaratory judgment from this Court as to whether the Control Share Amendment violates Section 18(i).

For the reasons discussed *infra*, both claims should be dismissed with prejudice.

LEGAL STANDARD

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The factual allegations must be sufficient to move the claims "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. While the Court "accepts as true all factual allegations in the complaint and draws all reasonable inferences in the plaintiff's favor . . . it does not credit 'mere conclusory statements' or 'threadbare recitals of the elements of a cause of action.'" *In re*

IAC/InterActiveCorp Sec. Litig., 695 F. Supp. 2d 109, 115 (S.D.N.Y. 2010) (*quoting Ashcroft*, 556 U.S. at 678).

ARGUMENT

I. THE COMPLAINT FAILS TO ALLEGE A VIOLATION OF SECTION 18(i)⁴

Both of Saba's claims turn on Saba's all-or-nothing theory as alleged in the Complaint: that *all* funds' control share provisions are *per se* illegal under the ICA in *all* circumstances. Thus, if the Court recognizes -- as the SEC Staff has expressly stated -- that it is legal for a fund to adopt a control share provision *in at least some circumstances*, then the Complaint fails on its face and must be dismissed. For the reasons discussed *infra*, that is precisely the case here: the Complaint's theory in this regard is contrary to the plain text of the ICA, its stated purposes, and guidance from the SEC Staff. For these reasons (and still others), the Complaint fails to state a claim.

A. The Control Share Amendment Complies with the Plain Language of Section 18(i)

Both of Saba's claims allege that the Control Share Amendment (and all other control share provisions, for that matter) is unlawful under the ICA because it violates Section

⁴ In its portion of the joint pre-motion letter to the Court, Saba cited to a decision by the U.S. Court of Appeals for the Second Circuit in *Oxford University Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99 (2d Cir. 2019) when arguing that Saba has a "private right of action for rescission of contracts (or portions thereof) which violate the ICA." (ECF No. 30, Ex. B at 7 (internal quotation marks omitted).) Defendants acknowledge that the *Oxford University* court recently found that Section 47(b) of the ICA "creates an implied private right of action for a party to a contract that violates the ICA to seek rescission of that violative contract" in a decision that was contrary to long-standing precedent both from the U.S. Court of Appeals for the Third Circuit in *Santomenno ex rel. John Hancock Trust v. John Hancock Life Insurance Co.*, 677 F.3d 178 (3d Cir. 2012) and other federal district courts. As a result of the *Oxford University* decision, Defendants do not argue in this memorandum that Saba lacks a private right of action to pursue its claim of rescission, but expressly reserve their rights to raise that argument later in this case (including on appeal).

(cont'd)

18(i). Section 18(i) provides as follows:

Except as provided in subsection (a) of this section, or as otherwise required by law, *every share of stock* hereafter issued by a registered management company . . . *shall be a voting stock and have equal voting rights with every other outstanding voting stock*: Provided, That this subsection shall not apply to . . . shares issued in accordance with any rules, regulations, or orders which the Commission may make permitting such issue.

15 U.S.C. § 80a-18(i) (emphasis added).⁵ Saba's argument in this regard is contrary to the plain language of Section 18(i), at least one other provision of the ICA, and ample federal and state court precedent interpreting the plain language of Section 18(i) (or other similar state statutes requiring "equal voting rights").

1. Defendants' Interpretation (Not Saba's) of Section 18(i) Is Consistent with Its Plain Language

It is axiomatic that any interpretation of Section 18(i) must begin with its plain language; if the statute's meaning is unambiguous, the Court's inquiry must end there. *See, e.g., Barikyan v. Barr*, 917 F.3d 142, 144 (2d Cir. 2019) ("Statutory analysis necessarily begins with the plain meaning of a law's text and, absent ambiguity, will generally end there.") Here, the plain text of Section 18(i) -- *i.e.*, that "every share of stock . . . shall be a voting stock and have equal voting rights with every other outstanding voting stock" -- confirms that the statute addresses only the voting rights attached to *stock* (which the Control Share Amendment does not affect), but not the ability of a given *shareholder* to exercise voting rights in certain circumstances (which the Control Share Amendment does affect).

The Control Share Amendment is thus not violative of the plain language of Section 18(i) because it neither strips voting rights from shares nor converts any shares into non-

⁵ The referenced exception in Section 18(a) allows closed-end funds to issue senior securities, and is not directly relevant to the present action. 15 U.S.C. § 80a-18(a).

voting securities. This fact is confirmed by the provisions of the Control Share Amendment itself: it expressly provides both that (i) concentrated shareholders may vote shares that constitute a Control Share Acquisition when authorized by other, disinterested shareholders; and (ii) once a person transfers beneficial ownership of shares that constitute a Control Share Acquisition to another person (and such transfer does not itself constitute a Control Share Acquisition), the receiving person will be entitled to vote those shares. (*See id.* § 9.4(b), (d).) Put differently, these provisions confirm that the stock acquired in a Control Share Acquisition always retains its status as a voting stock -- that does not change simply because a beneficial owner's ability to vote that stock may be limited in or conditioned on specified circumstances.⁶

2. Saba's Argument that Section 18(i) Must Be Read to Require that Every Shareholder Have Identical Voting Rights at All Times Is Disproven by Other Provisions of the ICA

For its part, Saba proffers an argument that conflates a stock's voting rights with a shareholder's ability to vote: in particular, Saba reads Section 18(i) as requiring that every shareholder have identical voting rights at all times. Indeed, in Saba's portion of the joint pre-motion letter to this Court, Saba expressly made this point by arguing that "there is no daylight in the ICA between the voting rights of *shares* and the voting rights of the *shareholder* that exercises that right." (ECF No. 30, Ex. B at 8 (emphasis in original).)⁷ Not only is Saba's

⁶ Saba's portion of the joint pre-motion letter to the Court cherry-picked language from the Control Share Amendment to suggest that it somehow "*is stripping voting rights not only from the shareholders, but from the shares themselves.*" (ECF No. 30, Ex. B at 8 (emphasis added).) This argument is unpersuasive. As an initial matter, Saba makes no effort to square this assertion with the provisions of the By-Laws that make clear that the stock constituting a Control Share Acquisition always retains its status as a voting stock. In any event, Saba's argument otherwise misses the mark because the effect of the Control Share Amendment is clear only when read in its entirety, not when fragments are viewed in isolation and out-of-context.

⁷ In support of this argument, Saba additionally noted in its portion of the joint pre-motion letter to the Court that the ICA contains a definition of "voting security" as "any security (cont'd)

argument in this regard in conflict with the plain language of Section 18(i), but it is also at odds with another section of the ICA that expressly limits the ability of a given *shareholder* to exercise voting rights in certain circumstances.

In particular, Section 12(d)(1) regulates "fund of funds" arrangements (*i.e.*, in which one fund invests in the shares of another) and provides, among other things, that a fund cannot acquire more than 3% of a registered investment company's voting stock. 15 U.S.C. § 80a-12(d)(1). Section 12(d)(1)(E)(iii)(aa), however, provides that a fund may exceed this percentage limit only if the fund votes (i) in accordance with instructions from its clients, or (ii) in a "mirror vote" fashion (*i.e.*, by voting the shares in the "same proportion as the vote of all other holders of such security"). 15 U.S.C. § 80a-12(d)(1)(E)(iii)(aa). In this way, Section 12(d)(1)(E)(iii)(aa) -- just like the Control Share Amendment -- limits how certain concentrated shareholders are allowed to vote their shares based on the size of their holdings in certain circumstances.⁸

presently entitling the owner or holder thereof to vote for the election of directors." (ECF No. 30, Ex. B at 7 (*citing* 15 U.S.C. § 80a-2(a)(42)).) As an initial matter, Section 18(i) does not use the term "voting security," such that Saba's reliance on this definition is tenuous at best. In any event, for the reasons discussed *supra*, Saba's citation to this definition does not change the fact that the Control Share Amendment does not strip voting rights from shares.

⁸ Notably, the legislative history to Section 12(d)(1) confirms that the SEC was motivated, at least in part, by a concern that shareholders may "exercise undue influence or control over the activities of portfolio funds." (Ex. K at 315 (H.R. Doc. No. 89-2337).) The SEC nevertheless noted, however, that even with the limitations under the then-proposed Section 12(d)(1), the risks posed by concentrated shareholders still persisted. For example, the SEC explained that "a single management group could attempt to organize several related fund holding companies" with each holding less than three percent of another fund's shares (thus under the threshold of Section 12(d)(1)). (*Id.*) In such an instance, the SEC recognized that the target fund "might find itself in a difficult position," and the concentrated shareholder (*i.e.*, the management group) "by threat of redemption, [could] induce deviations from the investment program or policy of registered companies subject to its influence. ***Should such influence be exercised, and to the extent it is so exercised, the management of the portfolio companies concerned would pass to persons other than those chosen by the stockholders to perform that function.***" (*Id.* at 316 (emphasis added).)

Section 12(d)(1)(E)(iii)(aa) simply cannot be squared with Saba's interpretation of Section 18(i): Saba cannot be heard to argue that Section 18(i) requires that every shareholder have identical voting rights at all times, even though Section 12(d)(1)(E)(iii)(aa) provides the opposite. Indeed, to agree with Saba on this point would ignore a basic maxim of statutory interpretation that requires that courts adopt "an internally consistent reading of [a] statute." *United States v. Martin*, 544 F.3d 456, 459 (2d Cir. 2008); *see also United States v. Raynor*, 302 U.S. 540, 547 (1938) ("A construction that creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the act, and will carry out the intention of Congress."). Instead, Section 12(d)(1)(E)(iii)(aa) is only consistent with *Defendants'* interpretation of Section 18(i) -- *i.e.*, that the statute addresses only the voting rights attached to *stock*, but not the ability of a given *shareholder* to exercise voting rights in certain circumstances. The Court should not adopt Saba's interpretation as a result. To be sure, Saba cannot escape the inconsistency that arises between its interpretation of Section 18(i) and the plain language of Section 12(d)(1)(E)(iii)(aa) by arguing that the latter is somehow an exception to the former: Section 18(i) expressly notes that Section 18(a) (which allows closed-end funds to issue senior securities) is an exception to its requirements, but is altogether silent as to Section 12(d)(1)(E)(iii)(aa) being similarly exempted. *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

For the avoidance of doubt, a recent SEC rule promulgated under Section 12(d)(1) similarly confirms that it is permissible to limit how concentrated shareholders are allowed to vote their shares based on the size of their holdings in certain circumstances. In particular, the

SEC adopted Rule 12d1-4 in October 2020 in order to "create a more consistent and efficient regulatory framework for fund of funds arrangements," including by allowing registered investment companies and business development companies ("BDCs") to acquire the securities of other registered investment companies or BDCs in excess of the limits provided in Section 12(d)(1). (Ex. L at 10 (Fund of Funds Arrangements, Investment Company Act Release No. 33-10871 (Oct. 7, 2020))); *see also* 17 CFR § 270.12d1-4.) Rule 12d1-4 requires that an acquiring fund and its advisory group use "mirror voting" as required by Section 12(d)(1) if they hold (in the aggregate) more than 10% of another closed-end fund. (*Id.*) In explaining the impetus for that threshold in Rule 12d1-4, the SEC noted, in part, the following:

We believe a 10% ownership threshold (an increase from the proposed 3% threshold) will permit an acquiring fund and its advisory group ***to gain substantial exposure to such funds with full voting discretion, but will reduce undue influence concerns associated with shareholder votes***, which are greater for acquired closed-end funds than for other types of acquired funds given the more frequent shareholder meetings.

(*Id.* at 52 (emphasis added).) This new rule is relevant here for (at least) two reasons. *First*, the plain language of Rule 12d1-4 -- like Section 12(d)(1)(E)(iii)(aa) -- cannot be harmonized with Saba's interpretation that Section 18(i) somehow requires that every shareholder have identical voting rights at all times. Notably, and as with Section 12(d)(1)(E)(iii)(aa), the SEC made no suggestion when promulgating Rule 12d1-4 that the rule was somehow an "exception" to Section 18(i). That makes sense: Rule 12d1-4 need not be an "exception" to Section 18(i) because, like the Control Share Amendment, Rule 12d1-4 does not affect the voting rights attached to stock. *Second*, here, the SEC's motivation in adopting the threshold included in Rule 12d1-4 further confirms that the SEC recognizes the potential "undue influence" that concentrated shareholders can have on a closed-end fund when such shareholders amass more than a 10% ownership threshold. Indeed, that same ownership threshold triggers a Control Share

Acquisition with respect to the Funds.⁹

3. Courts Interpreting the ICA Have Properly Distinguished Provisions that Impermissibly Strip Voting Rights from Shares and (As Here) Provisions That Permissibly Limit a Shareholder's Ability to Vote in Certain Circumstances

Although Saba's portion of the joint pre-motion letter to the Court attempts to dismiss Defendants' plain text reading of Section 18(i) as "wordplay," Saba altogether fails to acknowledge that courts routinely distinguish between provisions that impermissibly strip voting rights from shares and provisions that permissibly limit a shareholder's ability to vote in certain circumstances -- as is the case here (and in Section 12(d)(1)(E)(iii)(aa) and Rule 12d1-4). (*See* ECF No. 30, Ex. B at 8.) Tellingly, Saba to date has not attempted to distinguish the cases cited by Defendants that interpret the plain text of Section 18(i) or analogous state statutes, nor has it pointed the Court to a *single* case that supports its extra-textual reading of Section 18(i).

For example, the 2004 decision by the U.S. District Court for the District of Maryland in *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B* is particularly instructive, as the *Neuberger* court recognized the distinction under Section 18(i) between voting rights attached to stock and limitations on the shareholder's ability to exercise such voting rights in certain circumstances. 342 F. Supp. 2d 371 (D. Md. 2004). In *Neuberger*,

⁹ Even beyond the ICA, Saba's interpretation of Section 18(i) is additionally in conflict with other provisions in the federal securities laws. For example, Section 13(d)(1) of the Securities Exchange Act of 1934 requires that beneficial owners of more than five percent of a registered entity's securities (including shares of a closed-end fund) disclose certain information to the SEC on a Schedule 13D. 15 U.S.C. § 78m(d). That information includes not only the shareholder's holding size, but additionally whether the shareholder has an intention to change or influence control of the issuer. *See id.* Importantly, Rule 13d-1 provides that Schedule 13D filers may not vote their shares until 10 days after filing that schedule if the filer (i) has indicated some intention to change or influence control of the issuer in the Schedule 13D; or (ii) discloses a holding of more than 20 percent. 17 C.F.R. § 240.13d-1(e), (f). Although Rule 13d-1 places limitations on some shareholders to vote their shares on the basis of the size of their holdings, Defendants are unaware to date of any argument by Saba that this rule violates Section 18(i).

a closed-end fund organized as a Maryland corporation faced a challenge from activist investors who made partial tender offers seeking to acquire just over fifty percent of the fund's shares, and who were intent on changing the fund's investment adviser and its investment objectives. *Id.* at 372-73. In response, the fund adopted a number of defensive measures, including (i) opting into the Maryland control share statute, Md. Code, Corps. & Ass'ns § 3-701 *et seq.*; and (ii) adopting a so-called "poison pill," in which the fund's board declared a dividend of one "right" for each outstanding share to entitle the holder to purchase three additional shares at par value (\$.0001), but excluded holders of more than 11% of the outstanding shares from exercising those "rights." *Id.* at 374. In response to the latter measure, the activist investors argued that differentiation among shareholders under the poison pill violated Section 18(i)'s requirements that all shares be voting shares with equal rights. *Id.* at 375-76. The court rejected this argument, and instead held:

The poison pill does not change the fact that all shares are granted equal voting rights. The triggering of the poison pill on the Distribution Date does not revoke voting rights from any shares. Although ***the triggering of the poison pill*** will result in a reduction of the Acquiring Person's ownership interest, this is an issue of dilution of economic interest and corresponding voting power and ***has nothing to do with the voting rights of the shares themselves.***

Id. at 376 (emphasis added).¹⁰ Notably, the *Neuberger* court additionally cited and relied on

¹⁰ In Saba's portion of the joint pre-motion letter to this Court, Saba suggested that *Neuberger* is somehow inapplicable here because poison pills (*i.e.*, the subject of *Neuberger*) "involve the economic rights of shares, not the voting rights of shares." (ECF No. 30, Ex. B at 8.) Saba is mistaken. Poison pills, like control share provisions, affect a control shareholder's ability to vote in a particular circumstance (*i.e.*, when the "poison pill" is triggered): for example, once the poison pill is triggered, control shareholders will have less voting rights than before, particularly when considered as a proportion of their pre-poison pill holdings as compared to other shareholders' holdings. Indeed, this was precisely the argument that the *Neuberger* plaintiffs made and which the court rightfully rejected. *Neuberger*, Civ. A. No. 1:04-cv-03056-AMD (ECF No. 7 at 25) (Oct. 6, 2004) (*Neuberger* brief in support of motion for declaratory judgment) ("After the pill is triggered and the rights are exercised, the control

(*cont'd*)

state court decisions that interpreted various state "equal voting rights" statutes (similar to Section 18(i)). As in *Neuberger*, those cases are instructive in their own right here. *See id* at 375-76. (collecting cases).

For example, in *Providence & Worcester Co. v. Baker*, the Delaware Supreme Court considered a corporate charter provision that placed voting restrictions on shareholders with larger holdings: in particular, the provision provided that (i) each shareholder would receive one vote for each share held under fifty shares; (ii) the shareholder would thereafter receive one vote for each of the shareholder's twenty shares in excess of fifty shares; and (iii) that regardless of a shareholder's holdings, no shareholder could vote more than one-fourth of the outstanding common stock. 378 A.2d 121, 121 n.2 (Del. 1977). The *Providence* court held that the corporate charter did not violate a Delaware statute that required that all shares of stock within the same class have uniform voting rights, and in doing so explained:

In the final analysis, ***these restrictions are limitations upon the voting rights of the stockholder, not variations in the voting powers of the stock per se.*** The voting power of the stock in the hands of a large stockholder is not differentiated from all others in its class; it is the personal right of the stockholder to exercise that power that is altered by the size of his holding. In the hands of smaller stockholders, unrestrained in the exercise of their voting rights, the same stock would have voting power equal to all others in the class.

Id. at 123 (emphasis added). Other courts interpreting similar state statutes have repeatedly reached the same result. *See, e.g., Williams v. Geier*, No. 8456, 1987 WL 11285, at *3-4 (Del. Ch. May 20, 1987) (holding that differentiated voting rights based on the length of time shares

shareholder no longer has *equal* voting rights; instead, his shares have dramatically fewer voting rights than before."). Ultimately, the court concluded there (as the Court should here) that the poison pill's effect on a shareholder's right to vote in certain circumstances did not change the fact that all shares are granted equal voting rights. *See* 342 F. Supp. 2d at 376. The same conclusion is warranted here.

were held did not violate Delaware's equal voting rights statute because the charter did not "provide differing voting rights for the stock, per se"); *Harvard Indus., Inc. v. Tyson*, No. 86-cv-74639, 1986 WL 36295, at *1 (E.D. Mich. 1986) (finding that "poison pill" did not violate Michigan's non-discrimination statute because the mechanism "does not discriminate among shares but, rather, among shareholders, which is not forbidden").

Each of these cases (and still others) confirms that Defendants' plain text reading of Section 18(i) is not the "wordplay" that Saba suggests. Instead, courts have aptly distinguished between voting rights attached to stock and limitations on a shareholder's ability to exercise voting rights in certain circumstances. This Court should adopt that same plain text interpretation here.

B. The Control Share Amendment Furthers the Purpose and Design of the ICA

The Court should also consider the stated purposes of the ICA when interpreting the plain meaning of Section 18(i). *Puella v. Bureau of Citizenship & Immigr. Servs.*, 511 F.3d 324, 327 (2d Cir. 2007) (citing *K Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988)) ("In ascertaining the plain meaning of a statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). The prefatory language in Section 1(b) of the ICA makes clear that Congress intended the ICA to be interpreted in a manner consistent with the stated policies and purposes of the ICA. In particular, that prefatory language notes:

It is declared that the policy and purposes of this subchapter, in accordance with which the provisions of this subchapter shall be interpreted, are to mitigate and, so far as is feasible, to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors.

15 U.S.C. § 80a-1(b). One of the "conditions" enumerated in that section that Congress sought "to mitigate and, so far as is feasible, to eliminate" was the following:

... when investment companies are organized, operated, managed, or their portfolio securities are selected, in the interest of directors, officers, investment advisers, depositors, or other affiliated persons thereof, in the interest of underwriters, brokers, or dealers, in the interest of special classes of their security holders, or in the interest of other investment companies or persons engaged in other lines of business, rather than in the interest of all classes of such companies' security holders

(*Id.* (emphasis added).) Importantly, the term "affiliated person" is defined by the ICA to include "any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person" -- which necessarily means that Saba is an "affiliated person" of each of the Funds. 15 U.S.C. § 80a-2(a)(3); *see also* Compl. ¶ 5 (alleging that Saba is the beneficial owner of at least 9.9% of each of the Fund's outstanding shares). As a result, and in summary, the ICA purposefully intended to prevent investment companies (*i.e.*, the Funds) from being run for the benefit of concentrated shareholders or other investment companies (*i.e.*, Saba) rather than in the long-term interests of the investment companies' shareholders as a whole. Thus, rather than violating the ICA (as Saba suggests), the Control Share Amendment plainly furthers the stated aim of the ICA.

In its portion of the joint pre-motion letter to the Court, Saba acknowledges (as it must) that "the ICA is meant to protect against investment companies being dominated by the 'affiliated persons' of the investment company itself," but fails to acknowledge that Saba and any other entity subject to the Control Share Amendment -- as holders of more than five percent of the Funds' common shares -- are "affiliated persons" under the ICA's definition. (ECF No. 30, Ex. B at 8.) Saba thus fails to meaningfully counter Defendants' arguments that their interpretation of Section 18(i) is consistent with the plain meaning and policy of that statute.

C. The Control Share Amendment Is Consistent with SEC Staff Guidance

Although Saba's interpretation of Section 18(i) is at odds with the plain language of that statute and the stated purposes of the ICA (and should be dismissed on those bases), for

the Court to agree with Saba's interpretation would require that the Court *disagree* with the SEC Staff's interpretation -- *i.e.*, the government agency tasked with enforcing the ICA.

As discussed *supra*, in May 2020, the SEC Staff issued a statement that it would not recommend enforcement action against closed-end funds under Section 18(i) for opting in to and triggering a control share statute. (Ex. H.) Instead, the SEC Staff promulgated a "no action" position with respect to such statutes: the SEC Staff explained that it "would not recommend enforcement action to the Commission against a closed-end fund under section 18(i) of the Act for opting in to and triggering a control share statute if the decision to do so by the board of the fund was taken with reasonable care on a basis consistent with other applicable duties and laws and the duty to the fund and its shareholders generally." (*Id.*) The SEC Staff's position is relevant to the present inquiry for (at least) two reasons.

First, SEC no-action letters (similar to the statement here) are "widely regarded as persuasive authority" in the Second Circuit. *Schatzki v. Weiser Cap. Mgmt.*, No. 10-cv-4685 (RWS), 2016 WL 6662264, at *5 (S.D.N.Y. Nov. 9, 2016); *see, e.g., Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 163 (2d Cir. 2000) (finding a SEC staff accounting bulletin to be persuasive (*citing Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))). Indeed, the SEC Staff's Statement in this context should be given even greater weight because the ICA (including, necessarily, Section 18(i)) is exclusively enforced by the SEC. In its portion of the joint pre-motion letter to the Court, Saba adopted the nonsensical position that this Court should *not* treat the SEC Staff's recent statement as persuasive, but should somehow find the SEC's prior no-action letter that has been *rescinded* by SEC Staff (the "*Boulder Letter*") to be persuasive. (*See* ECF No. 30, Ex. B at 8-9.) Tellingly, Saba cites no support for this argument.

Second, Saba likewise did not deny (nor could it) in its portion of the joint pre-

motion letter that the gravamen of the Complaint is at odds with the SEC Staff's position. (*See* ECF No. 30, Ex. B at 8-9.) In particular, while the Complaint alleges that *all* control share provisions are *per se* illegal for all entities regulated under the ICA in all circumstances, the SEC Staff's statement takes the opposite position: the SEC Staff expressly state that they would *not* recommend enforcement action against a closed-end fund under Section 18(i) of the ICA for opting in to and triggering a control share statute in certain circumstances. Thus, unless the Court wholly disagrees with the SEC Staff's interpretation in all circumstances, Saba's Complaint must be dismissed.

No doubt cognizant of its Complaint's pleading deficiencies, Saba indicated in a footnote in its portion of the joint pre-motion letter that if the Court were inclined to adopt the SEC Staff's interpretation of Section 18(i) -- *i.e.*, that control share provisions must be viewed in the context of "the facts and circumstances under which they were adopted" -- that "Saba reserves the right to seek such discovery." (*See* ECF No. 30, Ex. B at 9-10 n.4.) In the first instance, this "reservation of rights" does nothing to save Saba's Complaint from dismissal: if the Court adopts the SEC Staff's reasoning, the Complaint must be dismissed because it lacks any allegations (conclusory or otherwise) that Defendants adopted the Control Share Amendment without "reasonable care on a basis consistent with other applicable duties and laws and the duty to the fund and its shareholders generally." (*See* Ex. H.)

In this regard, it should be noted that Saba intentionally pled its Complaint narrowly to avoid including any allegations that could be read as subscribing to the SEC Staff's interpretation of Section 18(i) (*e.g.*, by alleging that the Trustees adopted the Control Share Amendment without applying "reasonable care on a basis consistent with other applicable duties and laws and the duty to the fund and its shareholders generally"). As Saba well knows, such

allegations would be tantamount to alleging that the Trustees breached fiduciary duties -- which duties are owed to the Funds, *not the shareholders*, under Massachusetts law -- and it is settled law that any claim alleging such a breach must be brought by the Funds or derivatively on their behalf. *See Hancock v. Chambers*, 85 Mass. App. Ct. 1106, 2014 WL 959702, at *2 (2014). In an effort to avoid the procedural requirements that flow from pursuing such derivative claims here (including those procedures required by the Massachusetts universal derivative demand statute and the Funds' By-Laws), Saba purposefully chose to plead its claims in a way that was untethered to the particular "facts and circumstances" under which the Control Share Amendment was adopted. Saba cannot be heard to abandon that conscious decision now (least of all in a footnote to a pre-motion letter, rather than in an amended complaint). *See, e.g., Disabled in Action of Metro. New York v. Trump Int'l Hotel & Tower*, No. 01 CIV. 5518 (MBM), 2003 WL 1751785, at *13 (S.D.N.Y. Apr. 2, 2003) ("A claim for relief may not be amended by the briefs in opposition to a motion to dismiss. Plaintiffs have not moved to amend their complaint to add these factual allegations regarding particular violations, and they cannot do so through their memorandum. In considering this motion to dismiss, I am limited to consideration of the factual allegations in the complaint." (citation omitted)).

II. SABA'S DECLARATORY JUDGMENT CLAIM SHOULD BE DISMISSED AS PREMATURE

Saba's declaratory judgment claim is independently improper because the Complaint alleges no "actual controversy." 28 U.S.C. § 2201. In particular, the Declaratory Judgment Act permits declaratory judgments only in cases of "actual controversy" where "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941). When a party (as here) seeks a declaratory

judgment that a contract "is void and/or unenforceable," it must allege an "*imminent attempt* to enforce that contract" in order to present an "actual controversy." *Analect LLC v. Fifth Third Bancorp*, 380 F. App'x 54, 55 (2d Cir. 2010) (emphasis added).

The Complaint (and Saba's portion of the joint pre-motion letter to this Court) is altogether silent as to how (if at all) Defendants are imminently attempting to enforce the Control Share Amendment against Saba. On the face of the Complaint, the Control Share Amendment does not appear to currently affect Saba at all: there are simply no allegations as to whether Saba has made a Control Share Acquisition after the By-Laws' adoption. Thus, Saba's argument boils down to an assertion that they might *someday* wish to purchase more shares in an amount that might *someday* amount to a Control Share Acquisition. Such an attenuated hypothetical cannot be considered to be "of sufficient immediacy and reality" to warrant a declaratory judgment. *See Maryland Cas. Co.*, 312 U.S. at 273.

In its portion of the joint pre-motion letter to this Court, Saba argues that the inclusion of the Control Share Amendment in the By-Laws makes Saba a party to an illegal contract, which Saba suggests is purportedly sufficient to allege an "actual controversy." (ECF No. 30, Ex. B at 9.) Not only is this argument a tacit admission that Saba has not met the Second Circuit's "imminent attempt" standard, but it is wholly unsupported by the single, out-of-circuit case that Saba cites in support. Instead, that case explains only that the U.S. Court of Appeals for the Eighth Circuit requires that "the contractual dispute is real, in the sense that it is not factually hypothetical" before considering whether or not to issue a declaratory judgment in the context of a contractual dispute. *Maytag Corp. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 687 F.3d 1076, 1082 (8th Cir. 2012). Even under that Eighth Circuit standard, Saba fails to justify how its declaratory judgment claim has ripened into an "actual

controversy." Instead, as discussed above, the Complaint is devoid of any allegations as to how the Control Share Amendment will affect Saba outside of any "factual[] hypothetical." *Id.* Thus, Saba's declaratory judgment claim should be dismissed as premature.

III. SABA FAILED TO COMPLY WITH REQUIRED DERIVATIVE PROCEDURES

Defendants need not argue whether Saba's claims are truly derivative or direct in nature, as the Complaint plainly fails on the merits for the reasons discussed *supra*. That notwithstanding, Saba's Complaint alleges "in the alternative" that its claims are derivative in nature (Compl. ¶ 30), and at the March 23, 2021 initial pre-trial conference, Saba's counsel further suggested that Saba may attempt to argue that the illegality alleged in the Complaint is centered on the specific Control Share Amendment's adoption by the Funds here. Although there are no such allegations in the Complaint, any allegation that the Trustees acted improperly by adopting a *per se* illegal by-law amendment would be plainly derivative in nature, and, in either case -- *i.e.*, whether the Court considers the Complaint as pled (as required) or with Saba's proposed modifications to its allegations as stated at the conference -- dismissal is required because Saba failed to comply with required derivative procedures under the Massachusetts universal derivative demand statute and the By-Laws. *See* M.G.L. c. 156D, § 7.42; *see also* Ex. I at § 6.10(c).¹¹

In particular, the Massachusetts universal derivative demand statute requires -- in all derivative suits, without exception -- that a plaintiff make a written demand that the entity "take suitable action," *before* bringing a derivative proceeding. *Id.*; *see, e.g., ING Principal Prot. Funds Derivative Litig.*, 369 F. Supp. 2d 163, 171 (D. Mass. 2005) (noting that "the universal demand statute has no exceptions"). Once the entity receives the demand letter, the statute

¹¹ The demand requirement in M.G.L. Ch. 156D, § 7.42 applies equally to Massachusetts business trusts like the Funds. *See Halebian v. Berv.*, 457 Mass. 620, 623 n.4 (2010).

provides that it has at least 90 days to determine "whether it would be in the best interests of the [entity]" to take over the shareholder's claim. *Int'l Brotherhood of Elec. Workers Loc. No. 129 Benefit Fund v. Tucci*, 476 Mass. 553, 564 (2017). A shareholder-plaintiff may only thereafter initiate a derivative action if the entity (i) refuses a demand to bring suit, or (ii) ignores the demand for at least 90 days (or 120 days if the decision as to whether to pursue the claims is submitted to the shareholders for a vote). M.G.L. c. 156D, § 7.42(2).

Here, Saba issued its demands to rescind the Control Share Amendment on the *same day* it filed its Complaint, ignoring the statutory requirement to first make its demands and allow the Funds time to respond to those demands before bringing a derivative suit. (*Compare* Compl. ¶ 30, *with* Ex. J.) Saba has not identified any valid basis for its failure to abide by the Massachusetts universal demand statute (nor is there any such basis). Saba's processes for bringing its purportedly derivative claims were improper for (at least) the following reasons:

First, Saba suggests that its demands had already been rejected when the Complaint was filed. (Compl. ¶ 35.) That is not true. Saba's only basis for this assertion is the fact that the Funds adopted the Control Share Amendment at all. (*Id.* ("In announcing the [Control Share Amendment] in an October 5, 2020 press release, Defendants made clear that they were well aware of the potential conflict between the [amendment] and [Section 18(i)], but chose to adopt the [amendment] anyway.")) Saba's argument in this regard is nonsensical, and is unsupported by any caselaw. **Second**, Saba's claim that demand is futile purportedly because "Defendants have made plain that they will not take suitable action to remedy the wrongs," Compl. ¶ 35, is likewise without merit in light of the Massachusetts universal demand statute that requires a demand to be made in every instance. M.G.L. c. 156D, § 7.42; *Johnston v. Box*, 453 Mass. 569, 578 n.15 (2009) (noting that there is no futility exception to the demand

requirement). **Third**, Saba provides conclusory allegations that it will suffer so-called "irreparable injury" if it is required to comply with the 90-day waiting period under M.G.L. c. 156D, § 7.42. (Compl. ¶ 36.) Although Saba does not elaborate on the nature of the "irreparable harm," it is clear that there is none: indeed, Saba waited more than ninety days after the adoption of the Control Share Amendment to serve its demands and file its Complaint. As a result, Saba cannot claim an imminent irreparable injury when any purported timing emergency was of its own creation. *See, e.g., Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) (noting that the plaintiff's delay of suit for ten weeks after receiving actual notice of trade dress infringement undercuts claims of irreparable injury). And in any event, the statutory language invoked by Saba here refers to "irreparable injury to the *corporation*" (*i.e.*, the Funds) -- not injury to the would-be shareholder plaintiff (*i.e.*, Saba). M.G.L. c. 156D, § 7.42 (emphasis added).

CONCLUSION

For all of the foregoing reasons, the Complaint should be dismissed with prejudice (ECF No. 1).

Dated: New York, New York
March 30, 2021

Respectfully submitted,

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